Supreme Court, U.S.
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No. 94-1170

In The

Supreme Court of the United States

October Term, 1994

ARTHUR JOHNSON, individually and on behalf of all persons similarly situated,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, First District

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

> We hold that the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves. *American Airlines, Inc. v. Wolens*, ___ U.S. ___, ___, 63 U.S.L.W. 4066, 4067 (January 18, 1995) (*Wolens*).

If there were any doubt that this case should be summarily reversed, this Court's holding in *Wolens* removed it. In *Wolens*, which was decided two weeks after the instant petition was filed, this Court held, in no

uncertain terms, that state courts can enforce contractual obligations voluntarily undertaken by airlines.

And this case involves nothing more (and nothing less) than an effort to hold two airlines to the contract terms offered by them, and accepted by the petitioners. In an apparent effort to confuse the issue, the respondents have taken two tactically complementary, but analytically contradictory, approaches to the instant petition.

While acknowledging that the petitioners have abandoned all claims other than the plain breach of contract claims asserted in Count I of their respective complaints, respondent American Airlines, Inc. (American) nevertheless proceeds with an analysis which blithely ignores the clear import of this Court's decision in *Wolens*. In contrast, respondent United Airlines, Inc. (United), while acknowledging the import of *Wolens*, nevertheless proceeds with an analysis which assumes that the petitioners are asserting claims long ago abandoned by them.

The respondents cannot have it both ways. There is only one claim left in both cases: the claims asserted in Count I of each complaint, which seek only to hold the airlines to the terms of the bargains struck by the parties. And there is only one legal analysis applicable to this case: this Court's holding in *Wolens*, which plainly recognizes the validity of the claims asserted here.

THIS IS A SIMPLE BREACH OF CONTRACT CASE

In light of this Court's decision in *Morales vs. Trans World Airlines, Inc.*, 504 U.S. ___, 119 L.Ed.2d 157 (1992)

(*Morales*), the petitioners long ago abandoned the liquidated damages/unenforceable penalty theories earlier asserted in Counts II and III of their complaints. Knowing this, American summarily disposes of this issue in a footnote on page 3 of its response, where it acknowledges that these claims were "abandoned." United, in contrast, has responded as if these "abandoned" claims were the *only* claims involved in the case. Nothing could be further from the truth.

Count I of each complaint alleges that the airlines made an offer, that the petitioners accepted these offers, that consideration was exchanged, and that the airlines later reneged on the contract terms agreed to by both parties. These are the only claims left in these cases. To the extent United is confused about the claims remaining in this case, petitioners reiterate that they disclaim any effort to proceed with any claim other than those which seek to hold these airlines to the rates offered by them, and accepted by the petitioners. The abandoned claims plainly are preempted. The remaining claims plainly are not[1].

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[1] Although the petitioners' claims are simple, that is not to say they are insignificant. It should go without saying that the parties would not endure nine years of complex litigation over aggregate claims of less than $13.00. These are class actions, involving many millions of similar claims. And American's extensive discussion of the class certification issue simply does not belong in its response, since this issue has not been presented to this Court. Johnson's motion for class certification was ready for argument when the trial court, *at American's insistence*, deferred consideration of the motion pending its ruling on American's motion to dismiss. JC425, 460.

THIS CASE SHOULD BE SUMMARILY REVERSED IN LIGHT OF *WOLENS*

In *Wolens*, this Court found that the claims presented in that case "relate[d] to rates. 63 U.S.L.W. at 4069. But the Court (unlike the respondents here) acknowledged that this determination only begins the inquiry. This Court stated that the determination of whether a claim is preempted also requires an analysis of whether state court enforcement of contracts, voluntarily undertaken by airlines, amounts to the "enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of [§] 1305(a)(1)." 63 U.S.L.W. at 4069. The Court held that a "remedy confined to a contract's terms simply holds the parties to their agreements," and does not amount to state enactment or enforcement of a law relating to rates. *Id.* According to the Court:

> The ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what a State dictates and what the airline itself undertakes confines courts, in breach of contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement. 63 U.S.L.W. at 4070.

Here, as in *Wolens*, the petitioners seek only to hold the airlines to their own self-imposed obligations. Here,

as in *Wolens*, the petitioners do not seek to enlarge or enhance their claims based on any laws or policies external to the agreement of the parties. Here, as in *Wolens*, the issue is not what the State dictates, but only what the airline itself undertakes. Here, as in *Wolens*, there is no preemption.

And the respondents cannot seriously dispute this. United's peculiar focus on the abandoned claims amounts to a tacit admission that the simple breach of contract claims at issue here are not preempted. American, on the other hand, apparently refuses to accept the fact that it lost the *Wolens* case, and urges this Court to adopt the reasoning of one of the dissenting opinions in *Wolens*[2]. Indeed, American's Response reads almost as if it were intended as a petition for rehearing in *Wolens*.

But this is not a petition for rehearing. It is, rather, an effort to hold two airlines to their own self-imposed obligations. As such, the claims presented here are not preempted.

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[2] The only assertion offered by American which was not rejected by this Court in *Wolens* is its curious reliance on a regulation (14 C.F.R. § 399.84), *designed to protect consumers*, which prohibits deceptive advertising by airlines. But the fact that an airline is required to include the federal tax in its advertisement of fares has no bearing whatsoever on an agreement between the parties to a cancellation penalty of "25% of the fare." American is attempting to use a sword, which was given to consumers by the Department of Transportation, as a shield against the assertion of contract rights by consumers.

CONCLUSION

The instant case fell into the gap between *Morales* and *Wolens*. Had this Court decided *Wolens* first, this case would never have arrived here, because the courts below would not have dismissed these claims. As it is, nine years of litigation, and many millions of dollars in claims, now hang in the balance. Petitioners do not ask this Court for plenary review – such review is absolutely unnecessary in light of *Wolens*, which squarely held that claims like those asserted here are not preempted. Rather, petitioners respectfully submit that their petition should be granted, and the opinion below summarily reversed. In the alternative, the opinion below should be vacated, and remanded for reconsideration in light of *Wolens*.

Respectfully submitted,

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